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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1968,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7101 *et seq.*, requires collective bargaining over union proposals seeking to establish procedures for the development of measures of employee performance and the arbitral resolution of disputes over such matters.

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v.

FEDERAL LABOR RELATIONS AUTHORITY,

*Respondent.**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRELIMINARY STATEMENT

The American Federation of Government Employees, AFL-CIO, Local 1968, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

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* All the parties in the proceeding before the court of appeals are listed in the caption. The Department of Transportation, on behalf of the Saint Lawrence Seaway Development Corporation, was a party before the Federal Labor Relations Authority from whose decision judicial review was sought. The Department of Transportation did not participate in the proceeding before the court of appeals.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-18a) [1] is reported at 691 F.2d 656. The decision and order of the Federal Labor Relations Authority (App. C, 44a-61a) is reported at 5 FLRA No. 14.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1982, and this petition has been filed within 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case primarily involves Title VII of the Civil Service Reform Act of 1978 ("Reform Act"), Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. (Supp. V) 1101 *et seq.*, commonly known as the Federal Service Labor-Management Relations Statute ("statute"), 5 U.S.C. (Supp. V) 7101 *et seq.* (App. F, 101a-153a). This case also involves Title II of the Reform Act and regulations of the Office of Personnel Management, insofar as they pertain to the performance appraisal of federal employees, 5 U.S.C. (Supp. V) 4301 *et seq.* (App. G, 154a-160a), and 5 C.F.R. 430.101 *et seq.* (1980) (App. H, 161a-170a), respectively.

STATEMENT OF THE CASE

Petitioner, American Federation of Government Employees, AFL-CIO, Local 1968 ("AFGE" or "union") is a labor organization representing federal employees of the Department of Transportation, Saint Lawrence Seaway Development Corporation ("agency" or "employer") (App. C, 44a).

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[1] The appendicies are set forth in a separately bound document accompanying this petition.

During negotiations, the employer refused to bargain over the union's proposals relating to the employer's system for appraising the work performance of employees. (App. A, 3a; App. C, 44a-61a). Specifically, the employer refused to bargain over proposals which sought to establish bilateral participation in the development of measures of employee performance and to allow the parties to grieve disputes involving performance appraisal matters (App. A, 3a-5a; App. C, 44a, 47a, 52a, 53a).

The employer refused to bargain over the italicized portions of two proposals, set out in part as follows:

PROPOSAL III

Section 4. There shall be no secret studies bearing on performance appraisals. All studies conducted by the [employer] will be conducted on typical workers under normal working conditions. *The [u]nion shall participate on an equal basis in the development or revisions of all measures of performance and studies including but not limited to selection of typical workers and conditions. If agreement cannot be reached, formal negotiations will be convened. Any impasses will be referred to the Federal Service Impasses Panel for resolution.*

PROPOSAL IV

Section 6. Any disputes under this Article may be resolved under the negotiated grievance procedure including but not limited to:

1. *Challenges to critical elements of position.*
2. *The measure of performance as set forth in performance standards.*[2]

(App. A, 4a-5a; App. C, 52a-53a).

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[2] "Performance standards" and "critical elements" are defined by regulation as follows:

"Performance standards" are the expressed measure of the level of achievement . . . for the duties and responsibilities of a

AFGE, pursuant to 5 U.S.C. (Supp. V) 7117,[3] appealed the employer's refusal to bargain over these proposals to the Federal Labor Relations Authority ("FLRA").[4] The

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position or group of positions. [They] may include, but are not limited to, elements such as quantity, quality, and timeliness.

"Critical elements" means a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action . . . and may be the basis for removing or reducing the grade level of that employee.

5 C.F.R. 430.202(d) and (e) (1980).

Only the proposals set forth in the text are pertinent to this petition. AFGE had attempted to negotiate other proposals, including two proposals later declared nonnegotiable by the Federal Labor Relations Authority ("FLRA"), that sought to equate the critical elements of an employee's position with the grade controlling factors of the position (App. C, 44a-52a). The FLRA's ruling on these proposals was upheld by the court of appeals (App. A, 15a). AFGE does not seek review of the court's findings on these proposals. The FLRA declared negotiable that portion of Proposal IV which reads: "Any disputed action taken as a result of a performance appraisal will be treated as any other disciplinary matter" (App. C, 54a). The employer chose not to seek judicial review of this finding.

[3] Unless otherwise indicated, all subsequent statutory references are to title 5 of the United States Code (Supp. V).

[4] Title VII of the Reform Act establishes a framework for the conduct and administration of labor-management relations within the federal service. Prior to its enactment, labor-management relations within the federal government was established under a series of executive orders, beginning with Executive Order 10988, 27 Fed. Reg. 551 (1962), as revised and continued by Executive Order 11491, 34 Fed. Reg. 17609 (1969), as amended by Executive Orders Nos. 11616, 11636, and 11838, 36 Fed. Reg. 17319, 24901 (1971) and 40 Fed. Reg. 5743 (1975).

The FLRA is charged with administering the statute. Section 7105. It is an independent agency within the executive branch, with three members appointed by the President with the advice and consent of the Senate. See section 7104. Its role is analogous to that of the National Labor Relations Board ("NLRB") under the National Labor Relations Act. See 29 U.S.C. 151 *et seq.* Thus, the FLRA is required, among the responsibilities, to determine the appropriateness of units for collective bargaining, conduct repre-

FLRA denied AFGE's appeal, declaring that the proposals were nonnegotiable. In reaching this determina-

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sentation elections, and resolve allegations of unfair labor practices. Section 7105(a)(2)(A), (B), and (G). Additionally, the FLRA, as a result of some differences in the structural mechanisms established by the two statutes, also is responsible for resolving exceptions to arbitration decisions, section 7122, a role performed by the courts in the private sector; and resolving, through a prescribed statutory procedure, negotiability disputes, section 7117, a function performed by the NLRB through its usual unfair labor practice procedures. Further, under the statute, the Federal Service Impasses Panel ("Impasses Panel"), an entity within the FLRA, along with the Federal Mediation and Conciliation Service ("FMCS"), section 7119, is responsible for resolving negotiation impasses, which, in the private sector, are adjusted by forces and processes external to the NLRB. Final orders of the FLRA are subject to judicial review in the courts of appeals. Section 7123(a).

The statute requires that unions, as exclusive bargaining representatives, and agency-employers negotiate in good faith for the purpose of arriving at a collective bargaining agreement. Section 7114(a)(4).

Disputes relating to the negotiability of a proposal—often relating to a contention by an agency that a proposal interferes with its reserved authority under section 7106(a)—the management rights provision of the statute—can be resolved under alternative procedures. In the first instance, a union may challenge the agency's position by filing an unfair labor practice charge alleging a refusal to bargain in good faith. Section 7116(a)(5). In the second instance, as was the case here, the parties may obtain a ruling by the FLRA on the negotiability of a particular proposal. Section 7117. Under this procedure, a union, after management's refusal to negotiate over a proposal, petitions the FLRA for a determination as to the negotiability of the proposal at issue. *Id.* After submission by the parties of their statements of position, the FLRA issues a written decision and order. *Id.* The bargaining order does not require the parties to do anything other than to bargain in good faith over the proposals. The parties are not required to include the proposals, as written, within their collective bargaining agreement, nor are they even required to include the subject matter of the proposal in their agreement.

If the parties are unable to reach agreement over a proposal, procedures are prescribed for resolving the impasse. Section 7119. As an initial step, the parties voluntarily may seek to utilize the

tion, the FLRA, relying in large part upon its earlier decision in *National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt*, 3 FLRA No. 119 (1980) (App. D, 62a-82a), *aff'd sub nom. National Treasury Employees Union v. FLRA*, 691 F. 2d 553 (D.C. Cir. 1982) (App. B, 19a-43a), held that the proposals were outside the duty to bargain because the proposals, if agreed to by the parties, would interfere with the employer's authority to direct employees and assign work under section 7106(a) (App. C, 46a-47a, 53a, 55a-57a).

With regard to the proposals that sought to establish bilateral participation in the development of measures of performance, the FLRA stated: "[This] proposal would require bargaining to impasse concerning the particular performance standards to be established for employees in the bargaining unit [, and, thus,] bears no material difference in effect from the proposal . . . in *Bureau of the Public Debt*" (App. C, 53a; see App. A, 15a-16a).

With regard to the proposal that sought to allow the parties to grieve disputes over performance appraisal matters, the FLRA, citing its decisions in *Bureau of the Public Debt* and *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C.*, 3 FLRA No. 120 (1980) (App. E, 83a-100a) concluded:

> [This proposal], by providing for grievances which challenge the [a]gency's identification of the critical

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services of the FMCS. Section 7119(a). If agreement still cannot be reached, either party may invoke the processes of the Impasses Panel. Section 7119(b). The members of the Impasses Panel are appointed by the President, and they are familiar with government operations and knowledgeable in labor-management relations. Section 7119(a)(2). The Impasses Panel, either upon request by the parties, or by its own order, may require the resolution of an impasse through binding arbitration; alternatively, it may order the parties to submit the impasse to factfinding and recommendations or require the use of other dispute resolution mechanisms. Section 7119(b)(2) and 7119(c)(5).

> elements of a position and establishment of performance standards, would permit negotiated grievance procedures to extend to the [a]gency's exercise of its rights to direct employees and to assign work under section 7106(a)(2)(A) and (B). . . . [T]he proposal thereby would subject the [a]gency's exercise of these reserved rights to arbitral review and therefore to the possibility of arbitrators substituting their judgment for that of the agency with respect to those statutory rights. That is, [the proposal] would, in effect, permit arbitrators to overturn the [a]gency's identification of critical elements and establishment of performance standards and to render awards which would require the [a]gency to use different standards, contrary to the [a]gency's rights under the [s]tatute.

(App. C, 57a-58a).

AFGE sought judicial review of the FLRA's decision under section 7123(a). On appeal, AFGE raised three issues: (1) whether the plain language of the statute and its legislative history compelled the conclusion that the proposals were negotiable; (2) whether the FLRA's decision was arbitrary and capricious in that it lacked a reasoned articulation as to either why the proposals were proscribed by section 7106 or why the proposals were not negotiable under *Bureau of the Public Debt* and *AFGE, Local 32*; and (3) whether the FLRA had usurped the role of the Federal Service Impasses Panel ("Impasses Panel") by basing its determination on its assessment of the merits of the proposals rather than their negotiability under the statute (App. A, 8a-18a).[5] In affirming the FLRA's decision, the court of appeals ruled against AFGE on each issue (*id.*).

The court of appeals first held that several points raised by AFGE had been effectively disposed of by that court's decisions in *Department of Defense v. FLRA*, 659 F. 2d 1140 (D.C. Cir. 1980), and *National Treasury*

[5] See note 4.

Employees Union v. FLRA, 691 F. 2d 553 (D.C. Cir. 1982) (App. B, 8a), *aff'g Bureau of the Public Debt. Department of Defense* was rendered after submission of the union's principal brief in this case and *National Treasury Employees Union* was announced contemporaneously with the court's decision in this case (*id.*). The court's reference to *Department of Defense* apparently was intended to support the court's conclusion that section 7106(b), though literally providing for the negotiation of the two proposals here at issue, could not be so read if their adoption by the parties, in the FLRA's judgment, would interfere with authority reserved to management under section 7106(a) (App. A, 13a). The court's reference to *National Treasury Employees Union* apparently was intended to support the court's conclusion that the FLRA did not err in finding that the negotiation of performance standards and critical elements would impermissibly impede the authority of agency management to direct employees and assign work (App. A, 9a), rights which the court, in *National Treasury Employees Union*, characterized as "at the very core of successful management of the employer's business whether a private sector enterprise or the public service operations of a federal agency" (App. B, 38a). Additionally, both *National Treasury Employees Union* and *Department of Defense* contain statements, demonstrating the court of appeal's willingness to give substantial deference to the FLRA's negotiability determinations. (App. B, 29a, 35a; 659 F. 2d at 1161-1162).

The court, after stating its rejection of AFGE's construction of section 7106 (App. A, 13a), then rejected AFGE's argument that the FLRA's decision could not withstand judicial scrutiny because the FLRA has misapplied *Bureau of the Public Debt* and *AFGE, Local 32* (App. A, 15a-18a). In this regard, the court stated: "[P]roposal III, requiring as it does formal negotiations on measures of performance and further requiring referral of hopelessly-mired disputes to the Impasses Panel,

would [similar to the proposals in *Bureau of the Public Debt*] . . . restrict management's authority in that area by insisting that it be exercised only with union approval" (App. A, 15a-16a).

With regard to AFGE's contention that the FLRA had failed to articulate any basis for its departure from its finding in *AFGE, Local 32* that a union could grieve whether a performance standard was fair and equitable and consistent with the classification standards for the job (App. E, 92a-93a, 96a-99a; see App. A, 16a), the court stated that there was no such departure in this case because here, unlike in *AFGE, Local 32*, the proposals would allow arbitrators to "substitute their notions of proper [performance] standards and [critical] elements for those of management" (App. A, 16a).[6] The court

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[6] In finding a similar proposal negotiable in *AFGE, Local 32*, the FLRA stated:

> [A]n agency has the duty to bargain . . . on appropriate arrangements for employees adversely affected by management's exercise of its authority under section 7106(a), *i.e.*, actions taken under such standards. . . . Accordingly, insofar as the proposal here merely would establish a general, nonquantitative requirement by which the application of critical elements and performance standards may subsequently be evaluated in a grievance by an employee who believes that he has been adversely affected by the application of management's performance appraisal to him . . . , it is within the duty to bargain. Thus, an employee against whom management takes disciplinary action for unacceptable performance may, in a grievance of such action pursuant to section 7121 (a) of the [s]tatute raise the issue of whether the performance standards as applied to him meet the contractual requirements.

(App. E, 96a). The proposal in *AFGE, Local 32* read:

> All performance standards will be fair and equitable. . . . An employee who believes a standard does not meet the above criteria may grieve. . . .

(App. E, 92a-93a). The FLRA relied upon its finding in *AFGE, Local 32* in declaring negotiable a portion of Proposal IV in this case (App. C, 58a-59a). See note 2.

also rejected AFGE's contention that the FLRA had usurped the role of the Impasses Panel by stating that AFGE's position was not supported by the statutory scheme established by Congress (App. A, 18a, n. 88).

REASONS FOR GRANTING THE PETITION

In enacting the labor-management relations title of the Civil Service Reform Act of 1978, Congress intended to provide a means for labor and management to bargain collectively over conditions affecting employment within the federal service. This basic purpose of the statute has been undermined by the FLRA's finding in this case that section 7106(a) prohibits bargaining over proposals which (1) would establish bilateral participation in the formulation of measures of employee performance and (2) would enable the parties to effectively grieve disputes relating to the validity of performance standards and critical elements.

In enacting the statute, Congress intended that labor and management would be able to engage in collective bargaining over meaningful conditions of employment, including the appraisal of employee work performance. With regard to the evaluation of employee performance, Congress intended that the then existing system of appraisal should be replaced so as to provide a more valid means for evaluating employee performance. The new system would be used for recognizing and rewarding good performance, assisting employees in improving their performance, and, as necessary, reassigning, demoting, or discharging employees whose performance was unacceptable. Section 4301; see *National Treasury Employees Union* (App. B, 23a-24a). Moreover, Congress intended that this new system of appraisal would be developed only after "employee participation in establishing performance standards." Section 4302(a)(2). Yet notwithstanding the obvious and extensive impact of such systems on employees and the express mandate for employee participa-

tion in the development of such systems, the FLRA has interpreted section 7106, the "management rights" provision of the statute, in a manner which denies unions an effective means to negotiate and grieve in this important area. The FLRA's decision and the court of appeal's affirmance of that ruling are in error. Moreover, since the extent to which labor and management in the federal sector are obliged to bargain over matters relating to performance appraisal systems is an important and recurring question, review by this court is clearly warranted.

1. The plain language of the statute compels the conclusion that the proposals here at issue are negotiable.

a. Under the statute, "collective bargaining" and "conditions of employment" are defined very broadly. Section 7103(a)(12) and (14). The only limitations upon the obligation and duty to bargain over matters affecting employee working conditions are those relating to political activity, the grade classification of particular positions and matters specifically provided for by federal statute. Section 7103(a)(14).[7] Except for those areas, an obligation exists to negotiate over every subject matter affecting employee working conditions even though the right to negotiate over particular proposals may be limited in some respects by section 7106(a).

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[7] Section 7103(a)(14) reads:

"[C]onditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by federal statute.

Section 7106 reads in pertinent part:

> (a) *Subject to subsection (b)* of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> * * * *
>
> (2) In accordance with applicable laws—
>
> (A) To . . . assign [and] direct . . . employees in the agency;
>
> (B) To assign work. . . .
>
> (b) *Nothing in this section shall preclude . . . negotiating—*
>
> * * * *
>
> (2) Procedures which management officials . . . will observe in exercising any authority under this section. [Emphasis added.]

Thus, as Congress makes clear by its use of the words "subject to [the provisions of] subsection (b)," the authority reserved to management under section 7106(a) has been subordinated to the general obligation to negotiate all procedures relating to the exercise of the reserved authority.

Contrary to the conclusion reached by the FLRA and the court of appeals, the statute places no limitation on the right of parties to negotiate procedures relating to the direction of employees or the assignment of work, even if a proposal would somehow "interfere" with managerial authority in this area, a finding by the FLRA with which AFGE takes issue.[8]

That Congress intended, as evidenced by the language in section 7106, that proposals of the type here at issue would be negotiable is bolstered by the language in section 4302(a)(2), mandating that "employee participation" is a prerequisite to the establishment of performance appraisal systems. This language suggests not only

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[8] See discussion at 22-23.

that Congress intended that employees, through their bargaining representatives, play an important role in establishing performance appraisal system, but that *employee participation was an essential element of such systems even in the absence of a collective bargaining relationship.* This position is supported by the requirement of section 4302(b)(1) that "performance standards . . . , to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria." Without employee input—through their elected bargaining representative, where available to employees—there would be no way to achieve the accurate and objective evaluation required by Congress.[9]

The above statutory provisions support the negotiability of both proposals at issue in this case. Additional support for the negotiability of the proposal to allow the parties to grieve performance standards and critical elements may be found under section 7121, which provides that collective bargaining agreements "shall provide procedures for the settlement of grievances." Section 7103(a)(9) defines "grievance" as:

> [A]ny complaint—
>
> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee, labor organization, or agency concerning—
>
> * * * *
>
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment.

The only restrictions upon this broad definition of a grievance are contained in section 7121(c). None of

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[9] See discussion at 24, n. 17.

those exceptions pertain to matters related in any way to employee performance appraisal.

b. Although the court of appeals in *Department of Defense* observed that "the language of section 7106 . . . establish[es] a hierarchy in which the terms of subsection (b) hold priority over those of subsection (a)," the court rejected AFGE's contention that procedural proposals, *qua* procedures, were negotiable. 659 F. 2d at 1153. There the court of appeals characterized AFGE's construction as "constrictively literalist," suggesting that this construction ignored the intent of Congress to establish a "balanced statute." 659 F. 2d at 1159, 1160. In the instant case, the court recalled its discussion on this point in *Department of Defense*, stating:

> [I]n *Department of Defense* . . . we suggested the importance of drawing the line between proposals involving purely procedural steps and proposals "cast in procedural language [which] impinge upon substantive management decisions." The former are removed from the collective bargaining process only to the extent to which they preclude management from "acting at all," while the latter are similarly immune if their implementation would "directly interfere" with the agency's exercise of rights reserved by [s]ection 7106(a).

(App. A, 13a).

The court of appeals, like the FLRA, is mistaken in its construction of section 7106. While Congress certainly intended to create a "balanced" statute—a *sina qua non* for the development of a labor-management relations system—the structure of section 7106 reflects that "balance." The balance struck is that management retains the right to exercise authority in several specified areas; however, that authority is subordinated to the right of unions to negotiate with management over *any procedure* relating to its exercise as long as management is not prevented from "acting at all." Recognition that Congress already

has struck the balance between the obligation to bargain and reserved management authority demonstrates both the court's substantive error and its error in giving substantial deference to the FLRA (App. A, 13a); see *National Treasury Employees Union* (App. B, 29a, 35a). As stated by this court in *NLRB v. Brown*, 380 U.S. 278, 291-292 (1965), *quoting American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318 (1965), "the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

Contrary to the court of appeals, there is nothing in the statute, nor in the FLRA's decision, suggesting that the "direct interference" standard should be applied rather than the "acting at all" standard in determining the negotiability of a proposal. The "acting at all" standard, which is selectively applied by the FLRA in negotiability cases, *e.g. American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey*, 2 FLRA No. 16 (1979), and *American Federation of Government Employees, AFL-CIO, Local 547 and Veterans Administration Medical Center, Tampa, Florida*, 4 FLRA No. 50 (1980), has been approved by two courts of appeals. *Department of Defense*, 659 F. 2d at 1157-1158; and *Veterans Administration Medical Center, Tampa, Florida v. FLRA*, 675 F. 2d 260, 262-265 (11th Cir. 1982). As stated by the Eleventh Circuit:

> The statute itself clearly contemplates that . . . management's substantive rights will be subject to the negotiation of procedures under § 7106(b), and it does not specify any limit on procedures that may indirectly undermine the substantive rights. Thus, the "acting at all" standard seems a natural reading of the statutory language.

675 F. 2d at 263.

The "acting at all" standard, unlike the "direct interference" standard, is properly weighted to reflect the supremacy of section 7106(b) over section 7106(a). Although there is no magic attached to the label, its words capture the essence of section 7106; a contract procedure is lawful so long as it does not foreclose an agency from "acting at all" in the exercise of its managerial authority. The standard is consistent both with the supremacy of section 7106(b) and the canon of statutory construction requiring that all parts of a statute be read together in a manner which gives effect to each of its provisions. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955). Under this approach, the language of both section 7106(a) and 7106(b) is given effect so long as a proposal, crafted in procedural language, does not prevent an agency from "acting at all."

The "acting at all" standard stands in stark contrast to the "direct interference" standard applied by the FLRA in the instant case. By applying the latter standard, the FLRA attempts to insure that an agency is managed according to some perceived norm. The FLRA turns its inquiry into an assessment of how far a proposal can go before it becomes too burdensome to management, rather than merely determining whether a proposal prevents an agency from exercising its ultimate authority. Such inquiry by the FLRA fails to give effect to the language of section 7106(b), because it allows a proposal to be found nonnegotiable even where it does not negate an agency's authority. Such an inquiry, of course, requires the FLRA to examine the merits of a proposal, a role presumably better performed by management at the bargaining table or, if necessary, by the Federal Service Impasses Panel.

The "direct interference" test forces the FLRA to determine the merits of a proposal, thereby destroying the neutral role intended it by Congress. By "screening out" proposals which, if imposed in their existing form, could

have an impact upon management's reserved authority (even though not negating the exercise of such authority), the FLRA, in effect, reads out of the statute the role intended for the Impasses Panel. Congress intended that the negotiation process and the possibility of impasse resolution, not negotiability determinations by the FLRA, would result in the establishment of procedures that represent a workable accommodation between labor and management. The process of negotiation is a powerful constraint against the adoption of any proposal that would have an impermissible effect upon a management prerogative.[10] *See Dix-McGuire Exchange*, 2 FLRA at 156-158 (1979).

2. The legislative history of the statute evidences a strong recognition by Congress that collective bargaining would be stifled if the FLRA attempted to read section 7106 as a broad restriction upon bargaining.

As stated by Representative Udall, in the sectional analysis accompanying the substitute bill which he sponsored and which became law (see *National Treasury Employees Union*, App. B, 30a-31a):

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[10] The court of appeals upheld the FLRA's decision in the instant case, in part, by referring to the provision in the statute that it "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." Section 7101(b) (see App. A, 15a; *National Treasury Employees Union*, App. B, 33a-35a). The reliance by the court of appeals on this provision is mistaken. As stated by the Eleventh Circuit in *Veterans Administration, Medical Center, Tampa, Florida*:

> [This argument] misses the mark by challenging the union's proposed procedure, and not its negotiability alone. We express no opinion as to the merits of the procedure; we hold only that the agency must sit down at the bargaining table with the union to discuss the procedure. A finding of negotiability simply is not a requirement that the agency accept procedures capable of causing [unreasonable results].

675 F. 2d at 265.

> [T]he "management rights" section . . . is to be treated narrowly as an exception to the general obligation to bargain over conditions of employment.[11]

The statements by Representatives Ford and Clay, who also were strong supporters of the statute (see *National Treasury Employees Union*, App. B, 32a, 33a), are instructive on this point. As stated by Representative Clay:

> As the sectional analysis makes clear, the management rights [provision] is to be construed as a narrow exception to the general obligation to bargain in good faith. . . .
>
> If the [FLRA] is faithful to these interpretative guidelines [as set forth in the legislative history], the ultimate exercise of the specified managerial responsibility, the only subject exempted from the bargaining obligation, will be protected and the general obligation to bargain over conditions of employment will be unimpaired. However, it is essential that only those proposals that directly and integrally go to the specified management rights be barred from the negotiation.[12]

Representative Ford expressed similar concerns regarding the interpretation of the management rights provision:

> Too often the [Federal Labor Relations] Council [, the FLRA's predecessor,] interpreted the management rights [provision] so broadly as to stifle an attempt by both management and employees to address commonly recognized problems. . . .
>
> A principal goal in revising the management rights [provision] is to change the current situation

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[11] 124 Cong. Rec. 29183 (1978), as *reprinted* in House Comm. on Post Office and Civil Service, 96 Cong. Rec. 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* ("*Legislative History*").

[12] 124 Cong. Rec. 29187 (1978), *Legislative History*, 931-933.

> and, wherever possible, encourage both parties to work out their differences in negotiation. . . .
>
> [T]he committee . . . intended . . . that the listed management rights were to be narrowly construed exceptions to the general obligation to bargain . . . and that section 7106 "be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or proposal."
>
> * * * *
>
> The concept of negotiability is and must be a dynamic and growing one. If not, [f]ederal sector labor relations must fail because the energies of management and labor will be diverted from consideration of important labor relations problems to the litigation of the scope of exceptions to the general bargaining obligation.[18]

Moreover, the only legislative history directly on point indicates that performance standards would be negotiable. Alan K. Campbell, the Director of the Office of Personnel Management at the time the Reform Act was being considered by Congress, and James M. Hanley, then Chairman of the House Post Office and Civil Service Committee, engaged in the following colloquy during a hearing on the legislation:

> Mr. Hanley: What are your views in making performance appraisal systems subject to collective bargaining?
>
> Mr. Campbell: As I understand that situation today, the current performance appraisal system is contained in the statute. The new law will permit agencies to develop their own performance appraisal systems. Unless the agency violates government-wide regulations [which the proposals here at issue do not], the performance appraisal evaluation systems will come within the area of matters which may be bargained.

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[18] 124 Cong. Rec. 29198-29199 (1978), *Legislative History*, 953-956.

Mr. Hanley: But not subject to?

Mr. Campbell: It would be subject to bargaining to the extent that there is discretion. And this law allows a great deal more discretion then has been the case before in the development of those performance standards within the departments and agencies.[14]

Thus, the FLRA's constructive view of collective bargaining, as evidenced by the decision in this case, cannot be reconciled with either the plain language of section 7106 or its legislative history.

As evidenced by the legislative history, Congress intended that the scope of collective bargaining would be increased, not reduced, by the FLRA from that which was permitted under the executive order program by the Federal Labor Relations Council ("FLRC" or "Council"). However, the conclusions reached by the FLRA in the instant case and in *Bureau of the Public Debt* have reduced the scope of collective bargaining over performance appraisal matters from that which existed under the executive orders.[15] In *Patent Office Professional Association v. U.S. Patent Office, Washington, D.C.*, 3 FLRC 635 (1975), the FLRC held negotiable a proposal which established a method for setting production goals

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[14] House Comm. on Post Office and Civil Service, *Hearings on H.R. 11280, A Bill to Reform the Civil Service Laws*, 95th Cong., 2d Sess. (1978), 777.

[15] In considering the applicable legislative history, the court of appeals appears to have ignored its admonition that an allegation that a FLRA decision represents an impermissibly narrow view of collective bargaining requires "special scrutiny" by the court to determine whether "the FLRA has simply followed old practices and not adopted the revised mandates [intended by Congress]." *National Federation of Federal Employees, Local 1451 v. FLRA*, 652 F. 2d 191, 193 (D.C. Cir. 1981) (citing remarks by Representative Ford: "[I]n establishing judicial review we expect that the courts will scrutinize the actions of the [FLRA] with less of the deference given other administrative agencies.") 124 Cong. Rec. 38718 (1978), *Legislative History*, 1000.

and designating various levels of individual employee production as evidence in evaluating an employee's performance. As described by the FLRC:

> [T]he union's proposal set out a formula using historical and current data with regard to . . . the total number of examining hours actually worked by each examining group and assigned goals . . . to arrive at an "average historical complexity factor" and an "average individual [current] complexity factor" for each examining group. [The proposal] then directs that adjustments be made in each examiner's currently assigned goals . . . so that the examiners . . . [would] not be assigned . . . goals which would require them to complete the examination of a typical patent application in fewer hours than were taken to complete similar applications in the base period.

3 FLRC at 640-641.

Thus it is incredible that the proposals in this case, much less intrusive into management's authority to control workload and assignments, would be found nonnegotiable. Indeed there is no explanation by the FLRA as to why the rationale employed in the *Patent Office* case should not similarly control the issues here and in *Bureau of the Public Debt.* In the *Patent Office* case, the FLRC held:

> [T]he Council finds that the provisions of the proposal . . . neither purport . . . to limit, nor are intended to limit, the amount or type of work which management might assign to individual examiners or examining groups. Likewise, neither the language nor intent of the provisions prescribe how such work will be distributed by management among those individuals or groups which management determines are available to perform it. . . . [R]ather, the provisions are concerned with production expectations insofar as they may ultimately relate to the performance evaluation of individual examiners. . . .

> [T]he agency has failed to demonstrate that these proposed provisions would necessarily prevent management . . . to maintain the efficiency of its operation. In this regard, management's concern that [the] goals which would be established by the proposed provisions would tend to [interfere with the agency's operations] . . . is not a reason which would prevent negotiation of the provisions. . . . The obligation to negotiate does not imply a concomitant obligation to agree to a proposal. . . . [Contentions by management that a proposal would interfere with its responsibility to maintain efficiency of government operations] may not be invoked to deny negotiations unless there is a substantial demonstration . . . that increased costs or reduced effectiveness in operations are inescapable and significant and are not offset by compensating benefits.

3 FLRC at 641-642.

3. The reasoning offered by the FLRA in support of its decision does not withstand scrutiny. There is no rational basis to the FLRA's determination that the proposals here at issue would impermissibly intrude upon any reserved rights of management. AFGE's proposals in the instant case, unlike the proposal at issue in *Bureau of the Public Debt*, do not seek to quantify a measurement of performance. Thus, it is improper, as the FLRA has done in this case, to summarily conclude upon the basis of *Bureau of the Public Debt* that the instant proposals are nonnegotiable. Neither proposal seeks to set the level of work to be performed by employees. Instead, consistent with the requirement of section 4302 (a) (2) that agencies utilize employee participation in establishing performance standards, AFGE's first proposal merely provides a means by which such standards and critical elements will be developed. Further, AFGE's second proposal merely provides that disputes over such performance standards or critical elements may be grieved and, if necessary, presented to an arbitrator for resolution.

Thus, even if management's authority to "direct" and "assign" under section 7106(a) is as expansive as suggested by the FLRA in *Bureau of the Public Debt*, there is no rational explanation by the FLRA as to how the proposals in this case would interfere with such authority. Neither proposal relates to the direction of employees or assignment of work. Rather, as their language makes clear, the proposals are concerned solely with the procedures for evaluating employee performance and the resolution of disputes relating to the validity and application of critical elements and performance standards. There is simply no relationship, never mind one which would give rise to "direct interference," between, on the one hand, directing an employee and assigning work to him and, on the other hand, making *post hoc* decisions about the consequences of an employee's success or failure in carrying out an assignment or directions. These are two separate and distinct phases of personnel management. None of the proposals would allow AFGE to interpose itself between a manager and an employee at the point where a lawful order to perform a task is being given. Under AFGE's proposals, a manager retains his full authority to direct and assign all work regardless of whether the union has a role in the development of measures of performance or whether an arbitrator is given an opportunity to resolve disputes over performance standards and critical elements.

At the crux of the FLRA's decision appears to be a reluctance to allow negotiability over the proposals because they would, at a minimum, delay the application of a standard and element to a particular employee.[16]

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[16] The FLRA's decision ignores that it is common practice in the public and private sector for matters such as production standards or evaluation systems to be grieved prior to their application to individual employees. *See e.g., U.S. Postal Service*, 67 Lab. Arb. (BNA) 133, 135 (1976), (Garrett, Arb.) (arbitration of U.S. Postal Service's letter carrier route evaluation systems); *Union Carbide Corp.*, 70 Lab. Arb. (BNA) 201 (1978) (Jones, Arb.); *Vermont American Co.*, 70 Lab. Arb. (BNA) 1041 (1978) (Moran,

Thus, with regard to the proposal that there be bilateral participation in establishing measures of performance, the FLRA's primary concern appears to be that bargaining to impasse over such matters might impede management authority (App. C, 53a).[17] Similarly, with regard to the proposal that would enable the parties to grieve disputes over performance standards and critical elements, the concern appears to be that this would delay application as well as allow a third party, *i.e.*, the arbitrator, to substitute his views for those of the agency on such matters (App. C, 57a-58a). However, this concern is directly contrary to the FLRA's holdings in *Dix-McGuire Exchange* and *Veterans Administration Medical Center, Tampa, Florida*, as approved by the District of Columbia (*aff'd in Department of Defense*) and Eleventh Circuit Courts of Appeals that delay is not an acceptable

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Arb.). If an agency in a particular case believed that an arbitrator's award was erroneous and unduly interfered with the agency's operations, the agency could request the FLRA to stay the award, consistent with its charge to review decisions by arbitrators. Section 7122.

[17] The FLRA, as noted by the court of appeals in *National Treasury Employees Union*, has allowed for some employee input into the development of performance appraisal systems (App. B, 41a). However, the FLRA has determined that the statute does not require that this input be made through the union. While the FLRA in *Bureau of the Public Debt* held that the parties may negotiate the form of this input (App. D, 76a), the FLRA has determined, in effect, that management shall be a partner in deciding how employees, not their union, should participate. This formulation by the FLRA fails to ameliorate the injury to employees which flows from the FLRA's determination that the union has no direct role in developing measures of performance. This finding also is at odds with the fundamental principle of labor relations that a labor organization, selected as the employees' bargaining representative—not individual employees—serves as the representative of the employees in matters affecting conditions of employment. *E.g., NLRB v. Insurance Agents International Union*, 361 U.S. 477, 484-485, 47 LRRM 2705 (1960); *General Electric Co.*, 150 NLRB 192, 57 LRRM 1491 (1964). *See Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).

basis upon which to rule a proposal nonnegotiable. Further, with regard to the FLRA's concern over an arbitrator substituting his judgment for that of an agency, Congress, by providing that disputes were subject to arbitration, section 7121, expressly has allowed for the "substitution" of an arbitrator's views for those of management. Indeed, the FLRA partially recognizes this fact by allowing for the arbitrability of disputes relating to the application of performance standards to aggrieved employees (App. C, 58a-59a). While the FLRA suggests that this somehow avoids the substitution of an arbitrator's judgment for that of an agency, the FLRA's position ignores (1) that an arbitrator, by reversing agency action upon the basis that a performance standard or critical element is improper, rejects the standard or element, thereby substituting his judgment for that of management. Moreover, the FLRA by its refusal to allow parties to grieve over performance standards and critical elements requires the parties to defer disputes over these matters until sometime after their development and application to employees. This prevents the early correction of an improper standard or element, thereby allowing injury generally to employees represented by the union. Arbitral, administrative, and judicial resources, never mind common sense, require a more expeditious and rational means for minimizing injury to employees and achieving resolution of disputes.

4. The interpretation given section 7106 by the FLRA and the court of appeals in this case is central to the scope of negotiation between labor and management in the federal sector. Since wages, hours, many benefits and other matters of concern to employees, which, traditionally, are established by collective bargaining, are set by Congress, the scope of collective bargaining and, conversely, the reach of management rights under section 7106 becomes all the more critical to employees and unions in the federal sector. If this Court decides to grant certiorari in this case, the Court will have the op-

portunity to provide crucial guidance as to how the section 7106 rights of labor and management should be harmonized, and to foster the emergence of collective bargaining in the federal sector, as originally intended by Congress in enacting the statute.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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